No. 86552-3

SUPREME COURT
OF THE STATE OF WASHINGTON



---

In re:

BOND ISSUANCE OF GREATER WENATCHEE
REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT

* * * * *

GREATER WENATCHEE REGIONAL EVENTS CENTER PUBLIC FACILITIES DISTRICT,

Appellant,

v.

CITY OF WENATCHEE, WASHINGTON,

Respondent.

---

# ANSWER OF TAXPAYER TO AMICI WASHINGTON STATE TREASURER AND CITY OF VANCOUVER

---

DAVIS, ARNEIL LAW FIRM, LLP
Thomas F. O'Connell, WSBA No. 16539
617 Washington Street
Wenatchee, WA 98801
(509) 662-3551
Attorneys for Taxpayer Representative

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

## I. INTRODUCTION

Amici Washington State Treasurer ("Treasurer") and City of Vancouver ("Vancouver") filed briefs on December 15, 2011. Amici propose that the Court determine whether a "contingent loan agreement" constitutes debt capacity by analyzing the validity of the agreement's contingency.[1] Such "contingent enough" tests fail to protect the objectives of limiting municipal indebtedness and do not promote clarity in municipal finance law.

## II. ARGUMENT

### A. Amicus City of Vancouver.

Amicus Vancouver agrees that the 2011 Interlocal Agreement does not constitute a "contingent loan agreement." Vancouver Br. 1-2 (Dec. 15, 2011). Instead, it argues that the 2011 Agreement constitutes "in substance a guaranty." *Id.* Regardless whether labeled a "loan," "guaranty," or "contribution," the 2011 Agreement creates a legally-enforceable obligation that requires the City to make immediate debt service payments to the PFD in amounts that exceed the City's constitutional and statutory debt capacity.

Vancouver agrees that no contingency exists in the 2011 Interlocal Agreement because the Appellant Public Facilities District ("PFD") is effectively

---

[1] Treasurer proposes that the Court consider "whether a true contingency exists." Treasurer's Br. 10 (Dec. 15, 2011). Vancouver proposes that the Court consider "whether the contingency is reasonably certain to occur." Vancouver's Br. 16 (Dec. 15, 2011).

"insolvent,"[2] *Id.* at 6-8, app. A, and because the City would be called upon to make debt service payments for the "foreseeable future" and "without any reasonable prospect" of being repaid. *Id.* at 2, 13.

The common law of guaranty confirms that the 2011 Agreement constitutes an "absolute" guaranty, as opposed to a "contingent" or "conditional" guaranty. The contract of guaranty is the:

> undertaking or promise on the part of one person which is collateral to a primary or principal obligation on the part of another, and which binds the obligor to performance in the event of nonperformance by such other, the latter being bound to perform primarily." *Robey v. Walton Lumber Co.,* 17 Wash. 2d 242, 255, 135 P.2d 95 (1943); *see also* 38 Am. Jur. 2d, Guaranty, § 21.

The contract of guaranty may be "absolute" or "conditional." *Id.,* 135 P.2d 95. An "absolute" guaranty is "an unconditional undertaking on the part of the guarantor that the debtor will pay the debt or perform the obligation." *Id.,* 135 P.2d 95.

"A conditional guaranty contemplates, as a condition to liability on the part of the guarantor, the happening of some contingent event *other than the default of the principal debtor* or the performance of some act on the part of the obligee." *Id.* at 256, 135 P.2d 95 (italics in original). The City's obligation to pay under the 2011 Interlocal Agreement is "absolute and unconditional" by its terms and depends on no happening other than the insolvent PFD's inability to

---

[2] The PFD's insolvency calls into question the validity of any bonds the PFD might issue in its own name. The PFD's insolvency further highlights that the proposed issuance of the 2011 bonds would, for all intents and purposes, be issued, backed, and paid for by the City of Wenatchee.

pay. Any contingency that may have existed under the 2011 Interlocal Agreement has long since "ripened," and the City would be saddled with an immediate and absolute obligation to make debt service payments. *Taxpayer's Br.* 34-38 (Dec. 5, 2011) (citing *Comfort v. Tacoma,* 142 Wash. 249, 255-56, 252 P. 929 (1927)).

Taxpayer disagrees, however, with Vancouver's proposed test that a guaranty constitutes unconstitutional debt "only if and to the extent it is reasonably certain to be drawn upon to pay principal." *Id.* at 2. An obligation's contingency does not depend on "reasonable certainty." An obligation is either contingent or absolute. *Button v. Day*, 205 Va. 629, 642-43, 139 S.E.2d 91, 100-01 (Va. 1964) (stating "the word 'absolute' means the opposite of 'contingent' . . . An obligation cannot be 'absolute' and 'contingent' at the same time"). The obligation created by the 2011 Interlocal Agreement is absolute and exposes the City's general fund and general taxing authority to liabilities far in excess of the statutory and constitutional limitations. *Taxpayer's Br.* 17-21, 34-38 (Dec. 5, 2011).

**B. Amicus Washington State Treasurer.**

The test proposed by the Treasurer creates an even greater threat that constitutional and statutory limitations on indebtedness would be circumvented by innovative politicians and financing schemes. The Treasurer proposes that the Court consider whether the parties have an arm's length relationship and whether "a *true* contingency exists." Amicus Treasurer Br. 10 (Dec. 15, 2011) (emphasis added).

The Treasurer's proposed test would require a factually-intense investigation of the subjective beliefs of politicians at the time a financing scheme was entered. The Treasurer proposes that contingency should be determined based "upon the relevant facts available to the contingent lender at the time it enters into the CLA" and based on "findings as to the amount and period during which such amounts are expected to be paid along with the facts and analyses it relied upon in reaching this determination." Treasurer Br. 14-15 (Dec. 15, 2011). Treasurer further argues that the determination "as to whether an obligation is truly contingent must be made and be binding at the time it is entered." *Id.*

The test proposed by the Treasurer would render constitutional and statutory indebtedness limitations into legal niceties, allow politicians near-unrestrained authority to incur debt, and make taxpayer challenges next to impossible. Furthermore, the Treasurer's proposed test would shift the entire risk of the ever-fluctuating marketplace unto the citizen taxpayers. Such a test cannot be squared with the language and purpose of limitations on municipal indebtedness.

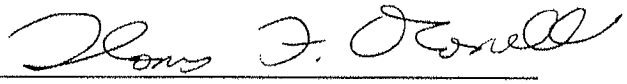
## III. CONCLUSION

The Court can achieve the "clarity, transparency and reliability" requested by the Treasurer by upholding the plain language and objective of constitutional and statutory limitations on municipal indebtedness. Affirming the Superior Court's determination that the 2011 Interlocal Agreement creates an

"obligation which in law must be paid from any taxes levied generally,"[3] provides clarity for municipal financing, protects citizens from excessive taxation incurred by unrestrained political ambition, and promotes the citizens' stated objective to limit indebtedness in a meaningful way.

RESPECTFULLY SUBMITTED this 30th day of December, 2001.

DAVIS, ARNEIL LAW FIRM, LLP
Attorneys for Respondent Taxpayer Representative

By: 
Thomas F. O'Connell, WSBA No. 16539

[3] RP 69, *citing State ex rel Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 661, 384 P.2d 833 (1963) (stating that "the mere guaranty of the principal and interest . . . even though there appeared to be more than ample revenues . . . contravened the constitutional debt limitations").